

**HB 150 Proponent Testimony from Tracey Knutson – Knutson & Associates**

My name is Tracey L. Knutson. I am an attorney in private practice in Alaska with a very national practice in recreation and adventure sports defense. I originally graduated from the University of Montana at Missoula law school in 1989 and first became licensed to practice law here in Montana. I have practiced law for twenty years now and have practiced in the recreation field for over 15 years and exclusively in recreation for about 8 years. My practice includes all of the following: representing and advising entities from the emerging commercial human space flight industry (which Congress has said is an adventure activity), doing proactive risk management for commercial operators from the ski industry to rafting, mountain climbing, etc., representing large commercial trade associations, defending through claims/trial recreational entities, assisting insurance underwriters in creating and maintaining recreational underwriting programs and assisting and advising public and private land administrators on recreational use and permitting issues.

Certainly there are a number of people here today who will provide articulate testimony on various aspects of this bill. Because of my familiarity with and even expertise with “inherent risk” as it applies to recreational endeavors, I would like to add some testimony on a few of the legal aspects of this particular bill.

First – I think we have to recognize that inherent risk in both the common law usage sense and in the codified sense has long existed in MT. To suggest that this is new or special or absolves anyone of their negligence is quite simply not true. In point of fact, the debate in MT regarding the application of “inherent risk” happened long ago and been resolved. To wit: the MT legislature has already codified the application of ‘inherent risk’ as to specific sports. See: MCA 27-1-727 Equine Activity Liability Limitations (“equine professional is not liable for an injury to or death of a participant...resulting from risks inherent in equine activities....”); MCA 23-2-651, 653 Snowmobiling Act (§651 “The state has a legitimate interest in...maintaining the economic interest of the snowmobiling industry by discouraging claims based on damages resulting from risks inherent in the sport” and at §653 “...a snowmobile area operator has no duty to eliminate, alter, control or lessen the risks inherent in the sport of snowmobiling...”); MCA 23-2-731, 736 Ski Areas (§731 “The state has a legitimate interest in maintaining the economic viability of the ski industry by discouraging claims based on damages resulting from the inherent dangers and risks of skiing...” and at §736 “...a skier shall accept all legal responsibility for injury or damage of any kind to the extent...it results from inherent dangers and risks of skiing...”); MCA 23-2-822 Off-Highway Vehicle Operators (“...an off-highway vehicle operator shall accept all legal responsibility ....for damage resulting from inherent risks....”); MCA 27-1-741 Amusement Rides (§3 “there are inherent risks associated with machinery, equipment or animals that are impracticable or impossible for an amusement ride owner or operator to eliminate....” and §4 “an informed patron is in the best position to avoid risk inherent to amusement rides...”). As such – this is really nothing new in terms of the Montana codes – the current HB 150 just applies an existing and accepted principal across the entire outdoor recreation industry – in other words – provides an umbrella application of the inherent risk principal across the outdoor recreation service industry.

Further – the courts in MT have also recognized and applied inherent risk as a legal theory. In a recent case which is especially notable because the Montana Supreme Court upheld a trial court ruling allowing

a recreational defendant from the equine industry to introduce into evidence a release and waiver document (which, in MT, is an otherwise illegal and unenforceable attempt to prospectively release the operator from tort liability – see, MCA 28-2-702 and Haynes v. County of Missoula, 517 P.2d 370, 377 (MT 1973) as relevant evidence to prove that the participant had been warned of inherent risks for which the operator would have no duty to protect him under the equine activities statute. McDermott v. Carie, LLC d/b/a/ Horse Prairie Ranch, 124 P.3d 168, 174 (2005). The McDermott court correctly recited the legal effect of applying inherent risk when it stated that “[t]he practical effect of these statutory provisions is to pronounce that equine activity sponsors do not have a duty to protect participants from either unavoidable risks or the inherent risks of equine activities....” Id.

Effectively then, inherent risk as it applies in the recreation industry IS established in Montana. To debate the intricacies of the theory of inherent risk is almost beside the point here – that debate has long since happened in front of other committees and in front of the judiciary and has been found meritorious.

Second – what could be said to be unique about this bill is what Sponsor/Representative Dee Brown has called the “umbrella approach” to this proposed code – or what we lawyers more commonly call the “omnibus” approach.

Legislation has been enacted in most states to help protect selected recreation and sport providers from liability for injuries resulting from the inherent risks of particular activities, or in many cases, from certain types of ordinary negligence by the provider. Some of these acts are in the form of “shared responsibility statutes” while others are more accurately designated as “assumption of risk” (subsumed in MT by the comparative fault analysis) or “inherent risk” statutes. These acts, which used to be collectively referred to as “sport safety acts” usually seek to provide some liability protections for recreation and sport businesses that make certain activities available to the public. Part of the significance here is the aspect of the small business providing recreational opportunities to participants.

Traditionally “shared responsibility” statutes enumerate the duties of the recreation or sport provider with the idea that, failure to satisfy those duties makes the statute inapplicable. Duties provided in these types of statutes are usually deemed to set the applicable standard of care. The second earmark of shared responsibility statutes is that they also specify duties of the participant. Failure of the participant to perform required duties could constitute contributory/comparative negligence and thus decreases situations in which recovery for the participants is possible. Usually shared responsibility statutes also enumerate certain provisions that preclude recovery. This is most closely how we would characterize the current ski safety and snowmobile acts in MT.

On the other hand, often statutes are written with less responsibility detail and are more particularly described as “statutory assumption of risk” or “inherent risk” statutes since the primary provision of the statute is to make clear that the participant assumes the inherent risks of the activity.

These two types of statutes have generally fallen into 5 categories across the United States – equine, skiing, skating (roller skating, ice skating, skateboarding, in-line skating, skate parks, etc.), statutes pertaining to other specific activities (for example: snowmobiling in 5 states, sport shooting in 3 states, baseball in 2 states, etc.) or general recreation and sport statutes (omnibus type statutes).

The movement toward the omnibus approach to recreation oriented legislation has grown in the last 5 years or so with six states (Hawaii, Utah, Vermont, Alaska, Wisconsin and Wyoming) having passed these acts. This type of legislation is intended to encompass a large number of activities and sports rather than only one or two. In each of these states providers are relieved of liability for inherent risks, but retain liability for the negligence of the entity or its employees. See, attached Table 1 listing recreational statutes by state.

There are several positive aspects of the omnibus approach to recreational inherent risk statutes. The first is that it provides some type of legislative economy in that – rather than have each individual sport or provider group marshal the time and resources necessary to pursue prophylactic legislation for their individual sport or activity, the legislature is able to provide protective codes that cover numerous groups with a single effort and a single code. Second, these single codes provide a more uniform or equal application of the theory of inherent risk – as opposed to the distinct differences that can occur between individually drafted statutes. And third and somewhat related to the second point – the omnibus statutes avoid legislative drafting problems that create the ‘*ex pressio unum*’ judicial construction problems; OIW’s if the legislature by simple error or fiat fails to or incorrectly expresses a risk or a responsibility then this error will not have a preclusionary effect on application of the statute. Further – because of the possibility that legislatures err in omitting a risk or responsibility – most courts addressing safety acts have said that a commercial operator retains a duty to act reasonably so that enumerated duties in the old style acts/codes are not exclusive anyway. This nonexclusivity of enumerated duties has already been enunciated by the MT Supreme Court in the case of Mead v. M.S.B., Inc d/b/a SNOWBOWL, 872 P.2d 782, 788 (MT 1994). For all of these reasons, the omnibus approach is often thought to be more consistent, concise, uniform and even conservative in approach. We also know that in MT, the original MT Skier Responsibility Act, as well as the Snowmobile Liability Statute were found by the court to violate the Equal Protection Clauses of the US and MT constitutions in improperly expressing relief for ski area operators from both inherent risks and from the operators negligence (See, Brewer v. Skilift, Inc., 762 P.2d 226, 230-231 (MT 1988) and Riska v. USDA, CV-96-63-BU-DWM (D. Mont, Oct 14, 1997) and Musselman v. USDA, 171 P. 3d 715, 720 ( 2007). The Musselman court specifically stated that “...all operators who provide a venue for inherently dangerous sports are similarly situated with respect to the mischief these statutes propose to remedy.” *Id.* In other words, by making the statutes uniform and consistent, even constitutional challenges can be avoided.

Third - at a policy level – which is what the legislature is charged with considering – we are trying here to balance the common good and to move away from the idea that the individual’s right to sue is the only consideration at stake in the legal context surrounding recreation. When we look at disputes as JUST the right of one citizen – an aggrieved party to air his or her claim – we are operating too much in a vacuum and not taking into account all of the other persons and entities outside of the court-room that are affected by these decisions. While no one would deny an individual litigant their constitutional right to make a claim – we can’t frame every solution in those limited terms. This type of one-sided focus on possible wrong-doing as alleged by the claims or demands of an individual isn’t proper balancing of interests or protections of all parties involved. Risk, by definition is a set of tradeoffs – we encounter one set of risks in order to accomplish something else. In this day and age we are all well apprised of the facts that there are cognitive, physical and social benefits to recreating and connecting with the land. We know the value of small businesses and we know the value of the economic impact the recreation industry has on the United States in general and on the State of Montana. If we focus only on the right of the individual

aggrieved folks rather than weighing the larger costs and benefits of the recreational industry we are driving our analysis toward the lowest common denominator where we do things like say that schools can't have playgrounds and kids can't play tag and rivers shouldn't be run. This literally means that injured people (the complainants) are quite literally setting the agenda and making social policy for us – and that is wrong. It IS the job of the legislature to weigh the greater value and benefits of the recreational industry and set a clear policy and that policy should be to simply recognize that we cannot eliminate all the risk in life (nor would we want to live that kind of gray bland mitigated and sanitized life) and sometimes we simply have to accept that no one is to blame. The needs of the injured individuals who would sue have got to be weighed against the rest of the community – people who want these recreational opportunities and people who run these very important businesses. You know – individual rights are not necessarily the best guarantor of fairness – if we don't enable our judiciary to draw the boundaries of reasonable risk then pretty soon legal fear undermines our freedom and you begin to see recreational opportunities decrease and public lands close. Fairness to all is quite literally impossible without empowering judges to balance reasonableness against entitlement. This monocular focus on the individual's right to complain – this over-emphasis on self entitlement is literally choking our freedoms and some of our greater social goals. Legally speaking – I believe that the goal of good public policy is to perpetuate the judiciary's authority to balance and to draw some boundaries around lawsuits; the needle should always settle at dead center – not to one side or the other and we want a court system that understands that this is the legal policy of this state.

**Table 1**  
**State Recreation- and Sport-Related Immunity Legislation**

State	Recreational User Statutes	Rec/Sport Volunteer Statutes	Good Samaritan Statutes	AED Good Samaritan Statutes	Equestrian Immunity Statutes	Ski Operator Immunity Statutes	Skating Immunity Statutes	Other Sport & Recreation Statutes	General Sport & Recreation Statutes	Hazardous Recreational Activity Statutes
U.S.		P.L. 105-19 42 U.S.C.S. 14,501-14,505		P.L. 107-188 42 U.S.C.S. 238q						
AL	AC 35-15- (1-28)		AC 6-5-332	AC 6-5-332	AC 6-5-337		AC 6-5-342 Skateboard Parks			
AK	AS 09.65.200 AS 34.17.055		AS 09-65-090	AS 09.65.090	None	AS 05.45.010 to .210				
AZ	ARS 33-1551		ARS 32-1471 ARS 32-1472 ARS 36.21.1	ARS 36-2261-2264	ARS 12-553	ARS 5-705 (1)		ARS 12-554 Baseball ARS 12-556 Motor Sports		
AR	ARS 18-11- 301 to 307	ARS 16-120-102	ARS 17-95-101	ARS 20-13-1305 ARS 20-13-1306	ARS 16-120- 201 to 202					
CA	CCC 846, 846.1		CCHSC 1799,102	ACC 1714.21 HSC 1797.190 SB 911 of 1999	None	5 county ordinances	See Hazardous Rec. Activity Statutes for Skateboard Parks			CGC 831.7
CO	CRS 33-41- 101 to 106	CRS 13-21-116	CRS 13-21-15.5	CRS 13-21-108.1	CRS 13-21-119	CRS 33-44- 101 to 114		CRS 13-21-111.8(1) Sport Shooting CRS 13-21-120 Baseball		
CT	CGSA 52-557Ek		CGSA 52-557B	CGSA 52-57b	CGSA 52-557p	CGSA 29- 201 to 214				
DE	7 DCA 5901-5907	16 DCA 6835 16 DCA 6836	16 DCA 6801	DCA 6801	10 DCA 8140					
FL	FS 375.251		FS 768.13	FS 768.1325	FS 773.01 to .05		FS 316.0085 Skateboard Parks			FS 316.0085
GA	OCGA 51-3-20 to 26; OCGA 27-3-1	OCGA 51-1-20.1	OCGA 51-1-230 OCGA 768.135	OCGA 31-11-53.1 OCGA 51-1-29.3	OCGA 4-12- 1to 5		OCGA 51-1-43	OCGA 27-4-280 to 283 Fishing		
HI	HRS 520-1 to 8	HRS 662D - 4	HI 663-1.5	HRS 663-1.5	HRS 663B-1 to 2		HRS 662-19, HRS 46-72.5, HRS 662D-4		HRS 663-1.54	
ID	IC 36-1604		IC 5-330	IC 5-337	IC 6-1801 to 1802	IC 6-1101-1109		IC 6-1201 to 1206 Outfitters & Guides		
IL	745 ILCS 65/ 1 to 7	745 ILCS 80/1	745 ILCS 49/12	410 ILCS 4/30 745 ILCS 49/12	745 ILCS 47/1 to 47/999		745 ILCS 72/1 to 30	745 ILCS 52/1 to /99 Hockey Facilities		745 ILCS 10/3-109
IN	ICA 14-22-10-2 to 2.5	ICA 34-30-4-2 ICA 34-30-19-3 to 4	ICA 34-30-12-1	ICA 16-31-6.2 ICA 34-30-12-1	ICA 34-6-2-40 to 43, 69, 95, 103; ICA 34-31-5-1 to 5		ICA 34-31-6-1 to 4			
IA	ICA 461C.1to .7		ICA 115.3 ICA 915.3	ICA 147A.10	ICA 673.1to 4		ICA 670.4 Skateboard Parks			
KS	KSA 58-3201to 3207	KSA 60-3607	KSA 65-2891	KSA 65-6149a	KSA 60-4001 to 4004					

KY	KRS 150.645 KRS 411.190		KRS 411.148 KRS 411.150	KRS 311.668	KRS 247.401 to 4029					
LA	LRS 9:2791, 2795	LRS 9:2798	LRS 9:2793	LRS 40:1236.11 to .14 LRS 9:2793	LRS 9: 2795.1					
ME	14 MRSA 159- A		14 MRSA 164	22 MRSA 2150-C	7 MRSA 4101- 4104A	26 MRSA 471 - 490-G 32 MRSA 15201 to 15227	8 MRSA 601-608 8 MRSA 625	8 MRSA 801-806 Amuse Rides; 32 MRSA 15219 Hang Gliding		
MD	MCA 5-1101 to 109	MCA 5-607 MCA 5-802	MCA 5-603	MCA 13-517	None					
MA	21 MGL 17C	231 MGL 85V	71 ALM 55A 111C ALM 29	112 ALM 12V1/2	128 MGL 2D	143 MGL 71H to 71S				
MI	MCLA 324.73301		MCLA 691.1501 MCLA 691.1507 MCLA 333.20965	MCLA 333.20965	MCLA 691.1661 to 1667	MCLA 408.321 to .344 or MSA 13A.82126	MCLA 445.1721 to .1726	MCLA 681. 1541 to .1544 MCLA 691.1544 Sport Shooting; MCLA 342.82126 Snow Mobiling		
MIN	MSA 604A.20 to 27	MSA 604A.11	MSA 604A.01	MSA 604A.01	MSA 604A.12					
MS	MCA 89-2- 1 to 27	MCA 95-9-3	MCA 63-3-405 MCA 73-25-37	MCA 41-60-33	MCA 95-11-1 to 7					
MO	MAS 537.345 to .348		RSM 537.037	RSM 190.092	MAS 537.325					
MT	MCA 70-16-301 to 302		MCA 27-1-714	MCA 50-6-505	MCA 27-1-725 to 728	MCA 23-2-732 to -736		MCA 23-2-651 to 656 Snowmobiling MCA 27-1-733 Rodeos		
NE	NRS 37-729 to 736		NRS 25-21, 186	NRS 71-51, 102	NRS 25-21.249 to .253					
NV	NRS 41.510	NRS 41.630	NRS 41.5000	NRS 41.500	None	NRS 455A.010 to -190	NRS 455B.200 to 300 Skateboard Parks	NRS 455B.010 to 455B.100 Amuse Rides		
NH	NHSA 212.34; NHSA 231-A:1 to 8	NHSA 508.17	RSA 508:12	RSA 153-A:31	NHSA 508.19	NHSA 225-A:1 to .26	NHSA 507 - B:11 Skateboard Parks		NHSA 507 B- 11	
NJ	NJS 13:1B-15. 134 to 142 NJS 2A-42A-2 to 10	NJS 2A-62A-6	NJS 2A-62A-1 NJS 26:2K-29	NJS 2A-62A-25	NJ S 5:15-1 to 12	NJS 34:4A-1; NJS 5:13-1 to 11	NJS 5:14-1 to 7	NJS 39:3C - 18 to 23		
NM	NMSA 17-4-7	NMSA 41-12-1 NMSA 41-12-2	NMSA 24-10-3	NMSA 34-10B-4	NMSA 42-13-2 to 5	NMSA 24-15-1- 14				
NY	NY GOL 9-103		NYCLSPH 3000-a	NYCLSPH 3000-a NYCLSPH 3000-b	None	NY GOL 18-101 to -108 NYLL 865 to 868				
NC	NCGS 38A-1 to 4		NCGS 20-166 NCGS 90-21.14	NCGS 90-21.15	NCGS 99E-1 to 3	NCGS 99C-1 to 5	NCGS 99E-10 to 14		NCGS Art 99E - 21-25	
ND	NDCC 53-08- 01 to 06	NDCC 32-3-46	NDCC 32-03.1-02	NDCC 32-03.1-02.3	NDCC 53-10- 01 to 02	NDCC 53-09-01 to 11				
OH	ORCA 1533.18 ORCA 1533.181		ORCA 2305.23	ORCA 2305.235	ORCA 2305.321	ORCA 4169.01 to .99	ORCA 4171.01 to .10			

OK	2 OS 1301-315 76 OS 5, 11 OS 76-10 to 15	76 OS 31	OS 76.5	76 OS 5A	OS 76 50.1 to 4								
OR	ORS 105.670 to .700 OS 76-10 to 15		ORS 30.800 ORS 433.830	ORS 30.802	ORS 30.687 - .697	ORS 30.970 to .990							
PA	68 PCSA 477-1 to 7	42 PCSA 8332.1	42 PCSA 8332	42 PCSA 8331.2	None	42 PCSA 7102 or 40 PCSA 2051							
RI	RIGL 32-6-1 to 7	RIGL 9-1-48	RIGL 9-1-27.1 RIGL 9-1-34	RIGL 9-1-34	RIGL 4-21-1 to 4	RIGL 41-8-1 to 4					RIGL 9-20-5 Snow Mobiles & ATVs		
SC	SCCA 27-3-10 to 70		SCCA 15-1-310	SCCA 4-76-40	SCCA 47-9-710 to 730					SCCA 52-21-10 to 60			
SD	SDCLA 20-9-12 to 18		SDCLA 32034-3 SDCLA 20-9-3	SDCLA 20-9-4.1	SDCLA 42-11-1 to 5					SDCLA 32-20A-21 to 23	SDCLA 32-20A-21 to 22 Snow Mobiling		
TN	TCA 11-10-101 to 105 TCA 70-7-101 to 105	TCA 62-50-201-203	TCA 63-6-218	TCA 63-6-218	TCA 44-20-101 to 105	TCA 68-114-102 to 107					TCA 70-7-201-204 Whitewater rafting		
TX	TCPRC 75.001 to .004	TCPRC 84.0001 to 008	VICA 74.001- /003	TCPRC 74.001	TCPRC 87.001 to .005					THSCA 759.001 to .005 THSCA 760.001 to .006			
UT	UCA 57-14-1 to 7		UCA 78-11-22	UCA 28-8-7.5 or 75	UCA 78-27-101 to 103	UCA 78-27-51 to 54				See Gen Rec & Sport Statutes for Skateboard Parks	UCA 47-3-1 to 3 Sport Shooting; UCA 78-27-61 Amuse Rides; UCA 78-27-62 Hockey Facil	UCA 78-27-63	
VT	12 VSA 5791-5795		12 VSA 519	18 VSA 907	12 VSA 1039	12 VSA 1036 to 1038				See Genl Rec & Sport Statutes for Skateboard Parks		12 VSA 1037	
VA	VCA 29.1-.509		VCA 8.00-225	VCA 8.01-225	VCA 3.1-796.130 to .133								
WA	RCW 4.24.200 to 210		RCW 4.24.300	RCW 70.54.310	RCW 4.24.530 to .540	RCW 70.117.010 to .040; RCW 79A.45.010 to .060							
WV	WVC 19-25-1 to 7		WVC 55-7-15	WVC 16-4D-3 to 4	WVC 20-4-1 to 7	WVC 20-3A-1 to 8					WVC 20-3B-1 to 5 Outfitters & Guides		
WI	WSA 895.52 to .525		WSA 895.48	WSA 895.48	WSA 895.481-895.481 3 (e)	WSA 895.525				See Gen Rec & Sport Statutes for Skateboard Parks		WSA 895.525	
WY	WYO STAT 34-19-101 to 106		WYO STAT 1-1-120	WYO STAT 35-26-102 to 103	WYO STAT 1-1-121 to 123	WYO STAT. 1-1-121 to 123					WYO STAT. 1-1-118 Rodeos	WYO STAT 1-1-121 to 123	